IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOUNTAIN SOLUTIONS, INC., et al.	)	
	)	
Plaintiffs,	)	
v.	)	Case No.: 97-2116-KHV
	)	
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION

The Kansas Corporation Commission (the "Commission") has entered orders requiring Commercial Mobile Service providers ("CMS providers"), including the Plaintiffs, to contribute to the Kansas Universal Service Fund ("KUSF"). These orders directly contradict federal law.

Section 332(c) of the federal Communications Act of 1934, as amended, (the "Federal Act"), 47 U.S.C. § 332(c)(3)(A), expressly prohibits the Commission from assessing CMS providers for payments to the KUSF, unless it finds that Commercial Mobile Service is a "substitute for land line telephone exchange service for a substantial portion of the communications within" Kansas. 47 U.S.C. § 332(c)(3)(A) (the "Preemption Clause"). Not only did the Corporation Commission fail to make such a finding, it made no attempt to find that CMS is a substitute for land line service as required by the Preemption Clause.

As CMS providers, Plaintiffs will suffer imminent irreparable harm if the order is enforced. Hence, Plaintiffs have filed this motion for preliminary injunction, asking this Court to enjoin enforcement of the Commission's orders.

I.

FACTUAL BACKGROUND

This Motion seeks an order enjoining the enforcement of the Corporation Commission's Orders of December 27, 1996 and February 3, 1997 ("the Corporation Commission's Orders"). In Paragraph 187 of the December 27 Order, the Commission determined that providers of Commercial Mobile Services must contribute to the KUSF under Kan. Stat. Ann. § 66-2008(b) (Supp. 1996). In its February 3 Order, the Commission denied the Petition for Reconsideration of Mountain Solutions, Sprint Spectrum, CMT Partners, Topeka Cellular and AirTouch.

Plaintiffs are Commercial Mobile Service providers in Kansas. Commercial Mobile Services are mobile wireless telecommunications services, including digital and cellular telephone service. The Corporation Commission's Orders affect all of the Plaintiffs by requiring them to contribute to the KUSF in contravention of federal law.

The following chronological statement of events places the Corporation Commission's Orders in context. On April 4, 1996, the Commission created the KUSF to administer the collection and distribution of universal service support payments. The purported purpose of the KUSF was to ensure the universal availability of telecommunications service in Kansas.

On July 1, 1996, the Kansas Telecommunications Act (the "State Act") became effective. The State Act directs the Commission to require every telecommunications carrier, including wireless telecommunications providers (also known as Commercial Mobile Service providers), to contribute to the KUSF. K.S.A. 66-2008(b). Also on July 1, 1996, the Commission decided to consider guidelines regarding universal service in Docket Nos. 190, 492-U and 94-GIMT-478-GIT, entitled *In the Matter of A General Investigation into Competition Within the Telecommunications Industry in the State of Kansas.*

A hearing was held for all issues relating to the KUSF on August 12-15, 1996. No testimony or evidence was submitted before, during or after the August 12-15, 1996 hearing to support a finding that Commercial Mobile Services are a substitute for any portion of land line telephone exchange services provided within the state of Kansas. Such a finding was necessary under the Federal Act to support assessment against CMS providers for universal service funds.

Nevertheless, in Paragraphs 111 and 187 of its December 27 Order, the Commission found that CMS providers must contribute up to 14.1% of their retail revenue to KUSF (December 27 Order, ¶¶ 111, 187). The Commission further found that neither the State Act nor the Corporation Commission's rulings were in violation of, or inconsistent with the Federal Act. And the Commission failed to make a finding, as required by the Federal Act, that CMS providers are a substitute for land line telephone exchange services within the state of Kansas. Indeed, the Commission failed to even address the issue.

On January 14, 1997, Mountain Solutions, Sprint Spectrum, Mercury Cellular, CMT Partners, Topeka Cellular and AirTouch filed Petitions for Reconsideration requesting that the Commission reconsider its findings in Paragraphs 111 and 187. On February 3, 1997, the Commission entered an order that denied the motions filed by Mountain Solutions, Sprint Spectrum, CMT Partners, Topeka Cellular and AirTouch.[1] The Commission erroneously determined that K.S.A. 66-2208(b)'s requirement that all telecommunications carriers contribute to the KUSF was in accordance with federal law. (February 3 Order, ¶ 49-50).

Pursuant to the December 27, 1996 Order, on February 14, 1997, the National Exchange Carrier Association (NECA), the administrator of the KUSF, sent Plaintiffs a KUSF packet.

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[1] The Commission refused to consider Mercury Cellular's motion for reconsideration, on the grounds that Mercury Cellular was not a formal party to the KUSF proceeding.

In the packet, NECA directed Plaintiffs to pay a 9% assessment on all intrastate retail revenues beginning in March, 1997. On April 15, Plaintiffs must make KUSF payments to NECA based on March 1997 revenues. Payments are to be made on the 15th day of each following month based on revenues from the preceding month. In 1998, the assessment will rise to 12.13% and in 1999, to 13.68%.

The Corporation Commission's Orders and K.S.A. 66-2208(b), to the extent they require CMS providers to contribute to KUSF, violate the express preemption clause of 47 U.S.C. § 32(c) and the Supremacy Clause of the United States Constitution, art. VI, cl. 2. Accordingly, the Court should enjoin the Commission from enforcing its December 27 and February 3 Orders as those Orders apply to CMS providers' contribution to the KUSF.

II.

ANALYSIS

A. STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

An applicant for a preliminary injunction bears the burden of establishing that the relief requested is justified. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992). The moving party must show that:

> (1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.

Id. at 1198; *SAC and Fox Nation of Missouri v. LaFaver*, 905 F.Supp. 904, 907 (D.Kan. 1995). If the movant successfully establishes the first three elements, courts will apply a more lenient standard for the last element. *LaFaver*, 905 F.Supp. at 907. The movant must show only that

"the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation." *Id.*

B. FEDERAL PREEMPTION PROHIBITS THE COMMISSION FROM IMPOSING A KUSF OBLIGATION ON CMS PROVIDERS

In Paragraph 187 of the December 27 Order, the Commission concludes that Commercial Mobile Service providers must contribute to the KUSF in accordance with Paragraphs 109 and 110 and Operative Paragraph on page 77 of the Order. The Commission relied on Kan. Stat. Ann. § 66-2208(b)'s mandate that all telecommunication carriers contribute to the KUSF fund. The Federal Act, however, expressly preempts state imposition of such obligations. 47 U.S.C. § 332(c).

The Federal Act provides that the Commission may not impose universal service funding obligations on CMS providers in the absence of a finding that CMS providers in Kansas are a substitute for land line telecommunications services provided by incumbent Local Exchange Carriers ("LECs"):

> (3) State Preemption. -- (A) Notwithstanding Sections 2(b) and 221 (b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates...

47 U.S.C. § 332(c)(3) (emphasis supplied).

Under the Supremacy Clause of the Constitution, art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of Congress are invalid. *United States v. City of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). "Federal law preempts state law explicitly if the language

of the federal statute reveals an express congressional intent to do so." *Id.*, 100 F.3d 1509, 1512 (10th Cir. 1996) (citing *Barnett Bank v. Nelson*, 116 S. Ct. 1103, 1107-08, 134 L.Ed.2d 237 (1996)). Because the language of the Federal Act conveys an express legislative intent to preempt state law, the Federal Act prohibits any state statute from imposing contrary obligations on CMS providers.

A Connecticut Superior Court recently rendered a similar conclusion in *Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Dep't of Public Utility Control*, No. CV-95-0051275S, 1996 WL 737480 (Conn.Super., Dec. 11, 1996), (Attached at Tab A). The Connecticut Department of Utility Control determined that CMS providers were subject to the state universal fund requirements under a Connecticut statute imposing such requirements on "all telecommunications companies." *Id.* On appeal, the Connecticut Superior Court reversed the agency's decision, determining that the assessment was prohibited under the Supremacy Clause. *Id.* at 3. The court explained that "[b]y expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption." *Id.*

The Commission's Order completely ignores the preemption mandate in Section 332(c)(3) of the Federal Act.[2] The Commission failed to make a finding that CMS is a substitute for land line telephone exchange services for any portion of local land line communications within Kansas in its December 27 Order. The record is devoid of any evidence to support such a finding.

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[2] The Federal Communications Commission recently recognized the applicability of Section 332 to CMS, even noting its intent to enforce Section 332(c)(3). See First Report and Order, CC Docket Nos. 96-98 and 95-185 (Released August 8, 1996), Paras. 1023, 1024-25 (Attached at Tab B).

Indeed, the only evidence offered during the hearing before the Corporation Commission would support a finding that CMS is *not* a substitute. (Lammers Direct, page 27 lines 14-15; TR. 3024 lines 5-14)(attached hereto as Exhibit 1).

The Commission's failure to acknowledge and defer to federal preemption is both unlawful and unreasonable. *See Metro Mobile Control*, 1996 WL 737480 at 3. Accordingly, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE ORDER IS ENFORCED

The assessment of payments to the KUSF will cause Plaintiffs irreparable harm. The KUSF assessments against CMS providers are accruing even now, and have been since March 1, 1997. Because of the substantial nature of these assessments, all of the plaintiffs will be forced to pass those assessments to their customers. Such a substantial increase in the cost of Commercial Mobile Service will have a significant effect on the CMS market. CMS providers will lose *both* customers *and* revenue from those customers that remain. While plaintiffs expect that the assessments paid to the Commission will be returned ultimately, the plaintiffs will never be made whole for their lost customers and revenue.

These severe economic effects justify the entry of a preliminary injunction. By enjoining defendants from implementing the provisions of the Corporate Commission Orders until adjudication of Plaintiffs' claims, the Court can provide Plaintiffs with the ability to receive appropriate relief, without the threat of significant, long-term harm to their businesses.

D. THE THREAT OF HARM TO PLAINTIFFS FAR OUTWEIGHS POTENTIAL HARM TO THE COMMISSION

In contrast to the significant risk of harm to Plaintiffs if the injunction is not issued, the Commission will suffer little harm. Although the KUSF is scheduled to go into effect in April, 1997, the delay caused by the adjudication of this lawsuit will not significantly deter the goals of the fund. Most importantly, adjudication of this lawsuit will allow all of the parties, including the defendants, to proceed with certain knowledge of the legal limitations of the KUSF. In addition, Plaintiffs are prepared to post a bond with this Court in connection with their motion for a preliminary injunction. The bond ensures that the entry of an injunction will not harm the Corporation Commission or the KUSF.

E. ENTRY OF A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The entry of a preliminary injunction ensures that the KUSF will be administered in accordance with the mandates of federal law. This furthers the public's interest in seeing that its laws are enforced. In addition, by issuing an injunction, the Court will further the public interest in providing full relief to injured parties. If the KUSF is allowed to go into effect, Plaintiffs will forever lose their opportunity to obtain an adequate legal remedy. The severe harm caused by the improper charges to KUSF cannot be undone. This Court can ensure the opportunity for full relief by granting Plaintiffs' motion for a preliminary injunction.

III.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court to issue a preliminary injunction, as set forth in Plaintiff's Application, maintaining the status quo until a

hearing on the merits of Plaintiffs' claims can be held, and for such other relief as the Court deems appropriate and necessary under the circumstances.

Respectfully submitted,

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IN THE IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOUNTAIN SOLUTIONS, INC., ET AL., Plaintiffs, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, ET AL., Defendants.	Case No. 97-2116-KHV

MEMORANDUM OF LAW IN SUPPORT OF SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION TO DISMISS

I. INTRODUCTION

Southwestern Bell Telephone Company, has filed a Motion to Dismiss plaintiffs' complaint on the following grounds: 1) the relief requested by plaintiffs would violate 28 U.S.C. § 1342 because the KCC's December 27, 1996 Order requires SWBT to reduce its rates for access and long distance; 2) plaintiffs have failed to exhaust their administrative remedies; and 3) plaintiffs' complaint fails to state a claim upon which relief can be granted. For these reasons, the Court should enter its Order dismissing plaintiffs' complaint.

II. NATURE OF THE CASE

Plaintiffs have asked this court to declare ¶187 of the Kansas Corporation Commission ("KCC") Order dated December 27, 1996 in docket number 190,490-U ("The Order") and K.S.A. 66-2008(b) as invalid. Plaintiffs claim that The Order and K.S A. 66-2008(b) are preempted by 47 U.S.C. § 332(c)(3) and, therefore, violate the Supremacy Clause of the United States Constitution.

III. STATEMENT OF THE FACTS

1. Plaintiffs claim that 47 U.S.C. § 332(c)(3) preempts The Order and K.S.A. 66-2008(b). Complaint, ¶52.

2. 47 U.S.C. § 332(c)(3) applies only to state regulation of cellular entry or pricing. 47 U.S.C. § 332(c)(3), a copy of which is attached as Exhibit A.

3. The KCC has not regulated cellular entry or pricing. The KCC's Order on Reconsideration expressly provides: "All providers of intrastate telecommunications services, including incumbent LECs, will be subject to the same KUSF assessment. K.S.A. 1996 Supp. 66-2008(b) authorizes all contributors to pass through the assessment to their customers. No company is required to pass the assessment through." Order on Reconsideration, ¶ 28, a copy of which is attached as Exhibit B.

4. 47 U.S.C. § 254 expressly requires every telecommunications carrier that provides telecommunication services to "contribute, an equitable and nondiscriminatory basis, in a

manner to be determined by the State to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f), a copy of which is attached as Exhibit C.

5. K.S.A. 66-2001, et seq., ("The State Act") was expressly drafted to conform to 47 U.S.C. § 254(f), and expressly requires all telecommunications carriers to contribute to the Kansas Universal Service Fund ("KUSF") on a "equitable and nondiscriminatory basis." K.S.A. 66-2001, et seq., a copy of which is attached as Exhibit D.

6. The State Act specifically applies to wireless providers. K.S.A. 66-2001, et seq.

7. Wireless providers are telecommunications carriers under the Federal Act. 47 U.S.C. § 153 (43), (44), (46), a copy of which are attached as Exhibit E.

8. Pursuant to 47 U.S.C. § 253(d), preemption claims are within the purview of the FCC. 47 U.S.C. § 253(d), a copy of which is attached hereto as Exhibit F.

9. Plaintiffs have filed state court actions, challenging the Order and K.S.A. 66-2008(b). See Petition for Judicial Review and Notices of Petition for Judicial Review, attached as Exhibit G.

10. The Order requires SWBT to reduce its rates for long distance and access. Order, ¶103.

IV. ARGUMENTS AND AUTHORITIES

A. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test whether a claim has been adequately stated in the complaint. See Wright and A. Miller, Federal Practice and Procedure: Civil Sec. 1356, pp. 297-99 (1990). Dismissal is proper where plaintiff can prove "no set of facts in support of its claim that would entitle it to relief." Cayman Exploration Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1359 (10th Cir. 1989).

B. The relief requested by plaintiffs would violate 28 U.S.S. § 1342

The Order requires SWBT to reduce its access and long distance rates, and provides for a revenue neutral assessment to compensate SWBT from the KUSF. SWBT has filed tariffs, which took effect March 1, 1997, reducing such rates. Plaintiffs' Complaint seeks to enjoin the KCC and all those acting in "concert or participation with them" from implementing paragraph 187 and "any other paragraph related thereto" relative to the operation of the KUSF required by the Order.

The relief requested by plaintiffs would clearly violate the Johnson Act, 28 U.S.C. § 1342, which provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and.

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342.

The Johnson Act clearly precludes this Court from exercising jurisdiction over plaintiffs' Complaint. The Order is clearly an "order affecting rates chargeable by a public utility." The Order expressly requires SWBT to reduce its rates for access and toll services. Order, ¶ 103. The relief requested would constitute an injunction of an order "affecting rates" and, therefore, the plain language of § 1342 mandates dismissal.

Each of the four elements of 28 U S.C. § 1342 have been met. Plaintiffs claim that The Order and K.S.A. 66-2008 are preempted and, therefore, violate the supremacy clause. Jurisdiction over plaintiffs' Complaint is predicated upon this constitutional issue, which falls squarely within the Johnson Act's requirement that jurisdiction be based upon "repugnance of the order to the Federal Constitution."

Further, The Order does not interfere with interstate commerce; The Order specifically limits required assessments to those entities providing intrastate telecommunication services. In addition, The Order was entered after "reasonable notice" and hearing. Finally, a remedy in State Court is available.[1]

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1. Plaintiffs have filed State Court Petitions for Judicial review in Shawnee County, Kansas, seeking review of The Order. See cases No.97-CV-257, 97-CV-260, and 97-CV-261, attached as Exhibit G.

Therefore, pursuant to 28 U.S.C. § 1342, this Court is precluded from exercising jurisdiction over Plaintiffs' Complaint. Plaintiffs' request for injunctive relief falls squarely within the plain language of § 1342. The request for declaratory relief is also within the scope of § 1342. Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974).

Plaintiffs in this action have filed petitions for judicial review in the District Court of Shawnee County, Kansas, raising claims identical to the claims presented here. The Petitions for Judicial Review specifically ask the District Court to review the KCC Order dated December 27, 1996.[2] This Court should dismiss this case and allow the state court to hear this matter. See Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974)(court should refuse to hear case in conformity with comity doctrine).

C. Plaintiffs Failed to Exhaust Their Administrative Remedies

47 U.S.C. § 253 expressly requires claims of preemption, such as plaintiffs' claim, to be presented to the Federal Communications Commission (FCC). 47 U.S.C. § 253(d). Plaintiffs have failed to present their preemption claim to the Commission and, therefore, because plaintiffs have failed to exhaust their administrative remedies, this court should enter its order dismissing plaintiffs' complaint.

"Under the doctrine of exhaustion of administrative remedies, 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" Coosewoon v. Meridan Oil Co., 25 F.3d 920 (10th Cir. 1994) (quoting McKart v.

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2. The relief requested by plaintiffs in this case would practically constitute a stay on the state court proceedings in Shawnee County and, as a result, would violate 28 U.S.C. § 2283.

United States, 395 U.S. 185, 193 (1969)). "A party must exhaust administrative remedies when a statute or agency rule dictate that exhaustion is required." Id. Because 47 U.S.C. § 253(d) mandates Commission review of preemption claims, plaintiffs have failed to exhaust their administrative remedies and, therefore, plaintiffs' complaint should be dismissed.

Section 253(b) provides:

> STATE REGULATORY AUTHORITY. -- Nothing in this section will effect the ability of a state to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 253(d) provides:

> PREEMPTION. -- If, after notice of an opportunity for public comment, the Commission determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Therefore, the plain language of section 253(d) requires claims of preemption to be presented to the Commission.[3] Plaintiffs have failed to present their preemption claim to the

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3. Section 253(e), which provides "Nothing in this section shall effect the application of section 332(c)(3) to commercial mobile service providers," does not help plaintiffs. That section simply makes clear that the prohibition on regulation of cellular pricing and entry remains, except where cellular is a land line substitute. The KCC has not regulated cellular entry or pricing.

Commission and, therefore, have failed to exhaust their administrative remedies. As a result, plaintiffs complaint should be dismissed.

D. K.S.A. 66-2001, et. seq. and the Order Are Not Prohibited By or Inconsistent with Federal Law.

Plaintiffs rely upon 47 U.S.C. § 332 (c)(3), part of the Omnibus Budget Reconciliation Act of 1993, in attempting to argue that the Order and K.S.A. 66-2008(b) are prohibited by and, therefore, violative of the Supremacy Clause of the United States Constitution. Plaintiffs' reliance, however, upon section 332(c)(3) is misplaced because 47 U.S.C. § 254(f) specifically permits the KCC action at issue. 47 U.S.C. § 254 expressly authorizes and requires contributions by all telecommunications carrier to Universal Service Funds on an equitable and nondiscriminatory basis.

Section 254 was enacted pursuant to the Telecommunications Act of 1996.[4] Section 254(f) expressly recognizes that states have the authority to adopt universal service mechanisms so long as such mechanisms are not inconsistent with the FCC Universal Service Rules. Section 254(f) expressly requires every telecommunications carrier that provides intrastate telecommunication service to contribute "on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." Pursuant to 47 U.S.C. § 153(43), (44), (46), wireless providers are telecommunication carriers subject to 47 U.S.C. § 254(f). Therefore, § 254 expressly authorizes both K.S.A. 66-2001, et. seq.

4. 47 U.S.C. § 332(c)(3) was enacted as part of the Omnibus Budget Reconciliation Act of 1993. H. Rep. No. 103-111, 103rd Cong., 1st Sess.

and The Order. K.S.A. 66-2001, et. seq., requires all carriers to contribute to the Kansas Universal Service Fund on "an equitable and nondiscriminatory basis."

The plain language of 47 U.S.C. § 332(c)(3) makes clear that § 332(c)(3) limits only state regulation of cellular entry or prices. Section 332(c)(3) provides:

> (3) STATE PREEMPTION. -- (A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of Commercial Mobil Services. Nothing in this paragraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunication services necessary to insure the universal availability of telecommunications service at affordable rates . . . .

47 U.S.C. 332(c)(3) (emphasis added). Neither the Order nor K.S.A. 66-2008(b) attempt to regulate plaintiffs' rates or entry to any market.

The plain language of § 332(c)(3) is a limit on state regulation of cellular entry and pricing. The parenthetical language relied upon by plaintiff is a proviso to the prohibition on state regulation of cellular prices. Section 332(c)(3) effectively provides that states may impose state regulatory requirements where cellular is a substantial substitute for local service to ensure the availability of telecommunications services at affordable rates.[5] The Order takes no action affecting

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5. The KCC did not make any specific finding concerning the issue of whether cellular service is a substitute for land line services because it was not acting pursuant to § 332(c)(3). This (continued...)

plaintiffs' rates under any conditions. The KCC expressly disavowed any attempt to require plaintiffs to change prices as a result of KUSF assessments. Order on Reconsideration, ¶28.

Therefore, plaintiffs' supremacy claim is wholly without merit. The 1993 enacted statute relied upon by plaintiffs is inapplicable by its terms and plaintiffs have failed to advise the Court of the 1996 statute that is expressly applicable. Plaintiffs' argument is a claim that section 332(c)(3) expressly preempts K.S.A. 66-2001, et. seq., and the Order. See Plaintiff's Memorandum of Law in Support of Their Application for Preliminary Injunction at pp. 5-6; Complaint at pp. 15-16. The issue in evaluating such claims is whether the challenged action "falls within the federal sphere." Cable Television Association of New York, Inc v. Finneran, 954 F.2d 91, 98 (2d Cir. 1992). The Order and K.S.A. 66-2001, et. seq., not only fail to fall within the scope of 47 U.S.C. § 332(c)(3), they are expressly authorized by 47 U.S.C. § 254.

Any argument that The Order is preempted by § 332(c)(3) because it may indirectly affect rates is without merit. See Plaintiffs' Memorandum in Support of their Application for Preliminary Injunction, p. 7 ("plaintiffs will be forced to pass on those assessments"). In Cable Television Association, cited supra, the Court considered whether a cost imposed by New York state regulators on cable companies was preempted by 47 U.S.C. § 544(f)(1), which provided: "Any

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5. (...continued)
issue, however, was controverted and competent evidence was presented that cellular is such a substitute. See Tr. at pp. 70, 404, 1957, 2089.

Federal agency or State may not regulate the rates for the provision of cable services except to the extent provided in this section."[6]

The Court concluded that the costs imposed by the regulators were not preempted by Federal law. The Court's rationale is instructive. Though a company may seek to recoup costs by raising rates, such costs are not preempted by a prohibition on regulation of rates. See 954 F.2d at 101. "To hold that therefore every cost-imposing state regulation is pre-empted would conflict with the Cable Act's express authorization of state regulation and with the well established rule that even where a Federal statute pre-empts an entire field of regulation, 'every state statute that has some indirect effect [on that field] . . . is not preempted.'" Id. (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 (1988)(Federal Energy Regulatory Commission has exclusive jurisdiction over rates and facilities of natural gas companies, but not every law that affects rates and facilities is preempted)).

The holding of the Connecticut trial court relied upon by plaintiffs is not applicable. See Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Dep't of Public Utility Control, Case No. CV-95-0550096S (Conn. Superior Ct., December 9, 1996)(Exhibit B to plaintiffs' Complaint). The trial court disregarded 47 U.S.C. § 254 and misapplied the language of 47 U.S.C. § 332(c)(3) in erroneously finding that the challenged assessments were within the scope of § 332(c)(3). As noted above, § 332(c)(3) applies only to regulation of cellular entry or rates, neither of which has been undertaken by the Order. The assessments challenged by plaintiff do not constitute regulation

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6. The one exception was "for cable systems not currently facing effective competition." 954 F.2d at 98.

of cellular entry or rates.[7] The KCC expressly stated: "No company is required to pass the assessment through." Order on Reconsideration, ¶ 28.

Further, the portion of the FCC opinion in Docket No. 96-98 relied upon by plaintiffs is inapposite. The portion of the FCC opinion attached to plaintiffs' Memorandum in Support of their application for temporary injunction[8] discusses primarily 47 U.S.C. §§ 251, 252. The only discussion of § 332(c)(3) supports SWBT's argument above that the FCC is the appropriate administrative body to review preemption claims. See Exhibit B to plaintiffs' Memorandum in Support of their application for temporary injunction at p.3.[9]

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7. It should also be noted that the Connecticut state trial court was reviewing a state commission decision. See Metro Mobile, slip op. at 1. Plaintiffs have filed several state court actions in Shawnee County, Kansas, challenging the Order. As discussed above, this court should not maintain jurisdiction over this action, but should allow the state court procedure for judicial review, see K.S.A. 66- 118a et. seq. and K.S.A 77-609 et. seq. ,to run its course.

8. SWBT will file its Memorandum of Law in Opposition to plaintiffs' application for temporary injunction prior to the March 25, 1997 hearing.

9. In November, 1996, a Joint Board composed of State Commissioners and FCC Commissioners convened as required by 47 U.S.C. § 254 and issued its recommendations in the Joint Board Order in FCC Docket 96-45. In the Matter of Federal-State Joint Board on Universal Service, 12 FCC Rcd 87 (Nov. 7, 1996). In Docket 96-45, the cellular carriers argued they should be exempt from universal service funding because of § 332(c)(3), which is the same argument plaintiffs are attempting to make here. The Joint Board disagreed, finding that the universal service obligations were separate and distinct from the § 332 rate question. The Joint Board found that the cellular carriers are "telecommunications carriers" pursuant to the Federal Act. Plaintiffs have failed to address the Joint Board Order in their arguments, instead relying on an FCC Order that in fact supports SWBT's argument that plaintiffs have failed to exhaust their administrative remedies.

Finally, wireless providers would obtain a competitive advantage if they were not required to contribute to the KUSF on the same basis as all other providers. The Order requires all telecommunications carriers, including local exchange carriers, to contribute the same amount to the preservation of Universal Service in Kansas. If wireless providers are not required to contribute to the KUSF, their services would be relatively cheaper than wire line services, which would create a competitive advantage for the wireless providers. Such a result would be contrary to the Federal Act and K.S.A. 66-2001 et. seq., each of which require contribution on an equitable and nondiscriminatory basis.

Therefore, it is clear that the Order and K.S.A. 66-2008(b) are not preempted by 47 U.S.C. § 332(c)(3). Further, these challenged actions are specifically authorized by 47 U.S.C. § 254. As a result, plaintiffs' Complaint fails to state a claim for preemption and must be dismissed.

V. CONCLUSION

For the reasons set forth above, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,

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